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IN THE

Supreme Court of the United States

Term — 1961

No. 952

MARYLAND CASUALTY COMPANY,

Petitioner,

versus

HARRY H. HALLATT, Individually and as Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition for Writ of Certiorari brings here for review the petition and judgment of the United States Court of Appeals for the Fifth Circuit, entered January 10, 1964, reported at *326 F. 2d 275*, in which the court vacated and set aside its former opinion and judgment *(295 F. 2d 64)*, entered at a previous term of court on

October 6, 1961, and reinstated a judgment entered June 17, 1960, which had been reversed, remanded and retried in accordance with the court's opinion of October 6, 1961 (R. 163, 168, App. 5).

JURISDICTION

The judgment of the Court of Appeals is dated and was entered January 10, 1964 (R. 163, 168, App. 6). By order dated February 20, 1964 the court denied petitioner's timely petition for rehearing (R. 169, 176, App. 8). The jurisdiction of this court is invoked under *28 U.S.C., § 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals have jurisdiction to vacate and set aside its opinion and judgment after the expiration of the term of court in which the judgment was rendered and after denial of certiorari by the United States Supreme Court and a remand and retrial of the case in the court below.

2. Is a court of appeals in a diversity case authorized to reinstate a judgment of the district court which it has reversed and remanded for a new trial, merely because of a change in the decision law of the state occurring after the retrial, where the appellant has failed to put in issue any point of decision on which the intervening state court decision is based. May the court of appeals under such circumstances ignore completely the appeal taken from the judgment on retrial, and proceed to vacate its former opinion and judgment under the guise of considering a petition for rehearing.

STATUTES INVOLVED

The statutes and rules of court involved are *28 U.S.C. 48* (App. 37) and *Rule 3 of the Rules of the United States Court of Appeals For the Fifth Circuit* (App. 38).

STATEMENT OF THE CASE

The Facts

HARRY H. HALLATT and MARY VALENTINE HALLATT, his wife (now deceased) brought a writ of garnishment against MARYLAND CASUALTY COMPANY, to satisfy a personal injury judgment in the sum of $9,267.52. The garnishment action was tried in the United States District Court for the Southern District of Florida, which had jurisdiction of the controversy by reason of diversity of citizenship. The action sought to reach the proceeds of an automobile liability policy issued by Maryland to the judgment debtor, James R. Richardson. Maryland contended that the insured's noncooperation violated the policy condition and voided the coverage. Richardson had failed and refused to attend the trial of the personal injury suit brought by the Hallatts, though duly and repeatedly notified by Maryland of his duty under the policy to attend (App. 14). The Court of Appeals for the Fifth Circuit on October 6, 1961 reversed a judgment against Maryland, holding that the failure of the insured to attend the trial was prejudicial to the insurer as a matter of law; and that the lower court committed error in admitting evidence on the question whether or not the failure was prejudicial. *295 F. 2d 64* (App. 10). This court denied certiorari on March 19, 1962 (*82 S. Ct. 830, 369 U. S. 819, 7 L. Ed. 2d 785*).

The cause was remanded to the district court for a new trial. Upon substantially the same evidence a verdict and judgment dated August 29, 1962 was rendered in favor of Maryland, from which the plaintiffs appealed (R. 6, 146).

After rendition of the judgment and during the pendency of the appeal the District Court of Appeal for the Third District of Florida rendered its decision in *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company, 146 So. 2d 119 (Cert. denied 153 So. 2d 305)*, which was critical of the Fifth Circuit's opinion *(295 F. 2d 64)*, and held that a showing of prejudice is necessary to a disclaimer of coverage on the grounds of noncooperation (R. 164, App. 2).

The question of prejudice or lack of prejudice to the insurer had not been placed in issue on the retrial of the case. Neither was it the subject matter of the appellant's statement of points on appeal (R. 149-159). Instead, the case was tried on the issue of whether there was a justifiable excuse for Richardson's nonattendance and whether Maryland acted in good faith and with due diligence in its efforts to secure the attendance of Richardson at the trial. The plaintiffs appealed to the Court of Appeals for the Fifth Circuit from a jury verdict and judgment in favor of Maryland (R. 1, 6, 146).

The Decision of The Court of Appeals

The matter then came on to be heard before the Court of Appeals on the Hallatts' appeal from the judgment after the retrial in which the question of prejudice had not been put in issue. With the case in this posture the

Court of Appeals did a strange thing. It ignored completely the judgment from which the appeal had been taken (the only matter properly before it) and proceeded to reconsider its former opinion of October 6, 1961, on plaintiffs' untimely petition for rehearing (R. 161), notwithstanding the fact that the opinion was rendered at a previous term of court; that the mandate had been sent down; that the cause had been remanded and retried. The Court granted the plaintiffs' petition for rehearing and vacated its initial opinion and ordered reinstatement of the original judgment of June 17, 1960. (R. 167)

REASONS FOR ALLOWANCE OF THE WRIT

1. The Court in vacating its opinion and judgment rendered at a prior term of Court was wholly without jurisdiction and its action in so doing was such a departure from established precedent as to call for the exercise of this Court's supervisory power.

Upon denial of certiorari by the Supreme Court and the going down of the mandate, the opinion of October 6, 1961 became final by passage of time. When the mandate in that appeal was lodged in the court below the thread of jurisdiction was cut. Such decision and judgment cannot thereafter be withdrawn or modified save upon exceptional grounds not apparent in this record. See *Raymond v. Wickersham*, 129 F. 2d 522, 529, wherein the court said:

> "(5) The principle of law which appellants seek to invoke here has been applied in appellate tribunals, under certain circumstances differing

> from those at bar, in a number of cases which are cited in 84 A.L.R. 595, under the heading, 'Power to reconsider a decision obtained by fraud.' It is sufficient to say that the great weight of authority there collected and discussed is to the effect that an appellate tribunal after its judgment has become final and the mandate issued, has no jurisdiction or power to recall its mandate or reverse or modify its judgment except and unless such action is based upon a fraud *perpetrated in and upon the appellate court itself*." (Emphasis by the court)

Public policy demands that there be some point in every judicial proceeding when the decision has become final, the train of jurisdiction cut, and the parties out of court. Upon the going down of the mandate and the expiration of the term of court, the decision of the court on the former appeal became absolute. Due consideration for the public and the litigants before the court command that a finality be reached somewhere in the proceeding. This is not to say that the plaintiffs may not bring on for review the judgment rendered on retrial of the case. But the court never considered that judgment on its merits. Instead of coming to grips with the only appeal which was properly before it, the court leaped over the judgment brought there for review and proceeded to reconsider a matter jurisdictionally foreclosed.

We readily concede that in reviewing the judgment rendered on retrial, the reviewing court will apply the law as it is at the time of the review. *Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Car Co. (1919, C.A. 2 N. Y.), 261 F. 878, 8 A.L.R. 1023.* The court,

however, never undertook the task of reviewing that judgment on the record before it in the light of the most recent pronouncements of the Florida Court. It seems well established that a court of appeals is without any power to recall its mandate after expiration of the term at which the judgment was rendered and the mandate issued. *Foster Bros. Mfg. Co. v. National Labor Relations Board, 90 F. 2d 948; Deppe v. General Motors Corporation, 98 F. 2d 813, Cert. Denied 59 S. Ct. 462, 306 U.S. 633, 83 L. Ed. 1035, Rehearing Denied 59 S. Ct. 581, 306 U.S. 668, 83 L. Ed. 1063, and Petition Denied 59 S. Ct. 821, 307 U.S. 611, 83 L. Ed. 1494; Raymond v. Wickersham, 129 F. 2d 522; 5 BC.J.S. § 1996, p. 652.*

See particularly *Foster Bros. v. National Labor Relations Board, Supra,* in which the court said:

> "(1-3) We are clearly without power to grant the relief asked. Not only had the time for filing a petition for rehearing expired long before the petition was filed, but the term at which the decree was entered had expired also, the mandate of the court had issued and our jurisdiction over the cause had ended. It is well settled that an appellate court is without jurisdiction to recall its mandate after the expiration of the term at which decree was entered. • • • "

Moreover, the rules most generally adhered to are "that an appellate court is without power to recall a mandate regularly issued without inadvertence, fraud, prematurity, or misapprehension, and that it will not recall the mandate for the purpose of reexamining the

cause on its merits or to correct judicial error". *5B C.J.S. §1966, p. 650.*

Old precedents are perpetually being bombarded with new thoughts and ideas so that judicial concepts are continually undergoing reexamination and change. This does not mean that old judgments (correctly decided when entered) must be resurrected, reexamined and redecided with each new change in the law. The former opinion of the Court of Appeals (295 F. 2d 64) was correctly decided when rendered. The court is without jurisdiction or power to resurrect that judgment and to reexamine it in the light of recent decisions. Its power is necessarily limited to a review of the new judgment entered after retrial, upon the record in that case and in the light of existing precedents at the time of such decision.

A recent precedent has no greater jurisdictional force than the discovery of new evidence or new witnesses after the trial.

2. The Court's failure to consider the appeal from the judgment after retrial on its merits in the light of State Law existing at the time of such appeal is so manifestly against precedent and authority as to require the intervention of this Court.

Again, we wish to make it plain that the appeal from the judgment after retrial must be considered in the light of state law existing at the time of the appeal. *Messenger v. Anderson, supra.* The Court of Appeals was undoubtedly bothered by the fact that the appellant had failed

to put in issue the points decided by *Barnes v. Pennsylvania Threshermen Mutual Casualty Insurance Company, Supra.* All precedent and authority in the Fifth Circuit would require an affirmance of that judgment unless a timely objection was interposed and the point was directly decided by the lower court. See *Seaboard Air Line Railroad Company v. Horowitz (C.C.A. 5th 1960) 277 F. 2d 738; Sims v. Texas & N. O. R. Co., 5th Cir., 1959, 267 F. 2d 37; Cain v. Illinois Central R. Co., 5th Cir., 1959, 266 F. 2d 942; De Fonce Const. Co. v. City of Miami, 5 Cir., 1958, 256 F. 2d 425, certiorari denied 358 U.S. 875, 79 S. Ct. 115, 3 L. Ed. 2d 105; Ford v. United Gas Corporation, 5 Cir., 1958, 254 F. 2d 817, certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64.*

The judgment of August 29, 1962 is a valid judgment based upon a jury verdict as a result of a retrial of the case following the mandate of the Court of Appeals. When a case is reversed and remanded for further proceedings, it is retried "as is the former appeal had not taken place". *3 Am. Jur. § 1240, p. 736.* The plaintiffs' appeal to the Court of Appeals brought on for review the correctness of the district court's judgment on the retrial and should have been judged on the record made in the lower court, just as any other case. The rulings of the trial judge should have been considered and weighed in the light of the assignments of error and the points argued on appeal. It is manifestly clear that the lower court cannot be found in error for having failed to follow the intervening state court decision unless the principles of such decision were put in issue by objections to the evidence, motions for directed verdict, requested charges, etc. See *DeWaters v. Macklin Co. (C.C.A. 6th 1948), 167 F. 2d 694, 699.* The reviewing court will apply the law

as it is at the time of review, "but the rule is not applicable where the issue has not been made in the trial court and the court's judgment does not include a ruling on the issue". See *DeWaters v. Macklin Co., Supra.*

Thus, if the second appeal had been considered and decided on the record, the court in our judgment would have been forced to affirm. The device of ignoring the judgment from which the appeal was taken and attempting to reinstate a former judgment which it was without jurisdiction to consider, is a practice that should be condemned and requires the intervention of this Court.

CONCLUSION

FOR THE FOREGOING REASONS A WRIT OF CERTIORARI SHOULD BE ALLOWED.

Dated: March 23, 1964.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18485

MARYLAND CASUALTY COMPANY,

Appellant

versus

HARRY H. HALLATT and MARY VALENTINE HALLATT,

Appellees.

No. 20197

HARRY H. HALLATT, Individually and As Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Appellant,

versus

MARYLAND CASUALTY COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(January 10, 1964.)

Before RIVES and CAMERON, Circuit Judges, and HUNTER, District Judge.

Hunter, District Judge: The motion for reconsideration and rehearing in No. 18485 involves our initial decision in reversing and remanding a final judgment entered on a jury verdict in favor of plaintiffs, Harry Hallatt and Mary Valentine Hallatt, and against the garnishee, Maryland Casualty Company, for the sum of $9,267.52. The facts are detailed in that decision (295 F. 2d 64). The critical question was debated at length between the majority and dissenting opinions there. The majority held that the failure of the insured to attend the trial was prejudicial to the insurer as a matter of law, and that the lower court committed error in admitting evidence on the question of whether or not that failure was prejudicial. The dissent agreed with the District Court that the injured plaintiff had a right to show lack of prejudice and that the question of prejudice was a proper one for the jury.

This case was reversed and remanded and came on for retrial in the District Court again in accordance with the pronouncements of the majority. This resulted in a verdict and judgment in favor of Maryland, which was appealed to this Court on October 16, 1962. That appeal is now pending here (No. 20,197).

On November 5, 1962 the Florida Appellate Court for the Third District rendered its decision in *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company*, 146 So. 2d 119 (cert. denied 153 So. 2d 305). There, the Florida Court categorically and by name rejected the opinion of this Court and specifically adopted the dissenting opinion as correctly enunciating the law of Florida. On February 19, 1963, plaintiffs filed their motion for reconsideration and rehearing of our initial decision.

It is fair and accurate to say that the majority's opinion and the principles it stands for are not in accord with the clearly enunciated law of Florida. We know now that the law of Florida is and was at the time of the original trial in direct conflict with our holding. Are we to correct our error, now that the same suit is here a second time?

While *Erie*[1] made the law of the State effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for deciding at what step the state law would be finally determined. As a general rule, the decision of an appellate court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice.[2] We recognize that an appellate court's power to depart from its own ruling on a former appeal should be exercised sparingly and only in exceptional cases. This is an exceptional case. The litigation has not yet terminated. The initial error was our misapplication of governing state law. That error is revealed by an intervening clear enunciation emanating from a Florida Appellate Court.

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1 Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817.

2 United States v. Ohio Power Co., 353 U.S. 98; Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Car Co. (1919, CA2 NY) 261 F. 878, 8 ALR 1023; Luminous Unit Co. v. Freeman-Sweet Co. (1924, CA 7 Ill), 3 F. 2d 577; Sedalia ex rel. Ferguson v. Shell Petroleum Corp. (1936, CA8 Mo) 81 F. 2d 193, 106 ALR 1327 (stating that the doctrine of the law of the case as applied to successive appeals, is not an absolute rule of law, but rather a rule of practice or procedure); Cochran v. M. & M. Transp. Co. (1940, CA1 RI) 110 F. 2d 519; Kaku Nagano v. Brownell (1954, CA7 Ill) 212 F. 2d 262 (recognizing that the doctrine of the law of the case is not an "ironclad rule").

This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were "dead wrong." The Florida Court in *Barnes* has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision.

We conclude that the failure of the insured to attend the trial was not, as a matter of law, prejudicial to the insurer. The question of prejudice was a proper issue for the jury. *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company*, 146 So. 2d 119 (cert. denied 153 So. 2d 305). The District Court properly submitted to the jury that issue, together with the issues of good faith and diligence of Maryland and the excuse of Richardson for non-attendance. The evidence was adequate to sustain the jury verdict. The trial was free from any significant error.[1]

---

[1] Maryland specified 29 errors. Twenty-one were directed at the District Court's refusal to set aside the verdict. Seven complained of erroneous instructions. We are satisfied that the charge as a whole correctly stated the relevant principles of law in accordance with the law of Florida. The remaining specification complained of the District Court's action in permitting plaintiffs' counsel to cross-examine Maryland's witnesses as to whether Richardson's testimony would have helped Maryland. One witness answered: "I cannot say." The other answered: "It is conjecture, it is guess work." The jury could have inferred from the direct examination of these witnesses that Richardson's testimony was very important. Surely, the plaintiff had a right to cross-examine, to counteract that inference.

Accordingly, we now grant the petition for rehearing in Civil Action 18485, vacate our initial opinion and order therein, and affirm the judgment of the District Court rendered on June 17, 1960.

The appeal in Civil Action No. 20197 is now moot and it is remanded to the District Court to enter such orders as it may deem necessary, consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18485

MARYLAND CASUALTY COMPANY,

Appellant,

versus

HARRY H. HALLATT AND MARY VALENTINE HALLATT,

Appellees.

No. 20197

HARRY H. HALLATT, Individually and as Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Appellant,

versus

MARYLAND CASUALTY COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

Before RIVES and CAMERON, Circuit Judges, and HUNTER, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for rehearing in Civil Action No. 18485 be, and the same is hereby, granted; the initial opinion and order therein is vacated; and the judgment of the District Court rendered on June 17, 1960, is affirmed. It is further ordered that the appeal in Civil Action No. 20197 is now moot and it is remanded to the said District Court to enter such orders as it may deem necessary, consistent with the opinion of this Court.

It is further ordered and adjudged that Maryland Casualty Company be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 10, 1964

Issued as Mandate:

Filed Feb. 20, 1964, U. S. Court of Appeals, Edward W. Wadsworth, Clerk.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 18485

MARYLAND CASUALTY COMPANY,

Appellant,

vs.

HARRY H. HALLATT and
MARY VALENTINE HALLATT,

Appellees.

NO. 20197

HARRY H. HALLATT, Individually and As Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and HUNTER, District Judge.

PER CURIAM.

Upon considering the petition for rehearing filed by the appellant, Maryland Casualty Company, it is ordered and decreed that said petition be and it hereby is DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18485

MARYLAND CASUALTY COMPANY,

Appellant,

versus

HARRY H. HALLATT and
MARY VALENTINE HALLATT,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(October 6, 1961)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: On April 11, 1956, in West Palm Beach, Florida, the appellees, Mr. and Mrs. Hallatt, were passengers in an automobile involved in a collision with another automobile owned and operated by one James R. Richardson, Jr. Richardson was then a waiter residing in Palm Beach, and was insured by the appellant, Maryland Casualty Company, under a policy of automobile liability insurance which contained the following provisions:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have complied with all the terms of this policy . . .
>
> "Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy . . . "

Under the caption "CONDITIONS," No. 17, "Assistance and cooperation of the Insured" reads as follows:

> "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

The Hallatts claimed damages for their injuries. Maryland investigated the accident, and secured a written statement from Richardson. The Hallatts filed suit against Richardson, and Maryland undertook the defense of that action. Before the case was finally set for trial on May 18, 1959, some three years after the collision, Richardson had moved to Massachusetts.

Maryland duly and repeatedly notified Richardson of

the trial date and requested him to attend. Richardson declined, stating that he had been out of work all of the preceding winter, and had then secured a job painting bridges which paid him $200.00 per week. Maryland continued to insist on Richardson's attendance, and offered to pay his traveling expenses. On May 9, 1959, Richardson wrote to Maryland, "I shall be unable to make it to Florida as I am working now." Maryland notified Richardson that, if he persisted in his refusal to attend the trial, it would disclaim coverage because of his failure to cooperate. Richardson politely, but adamantly, persisted in his refusal to attend the trial.

Counsel employed by Maryland to defend the suit then moved the court for leave to withdraw as counsel for Richardson. That motion was denied, and the case proceeded to trial. The trial court granted the motion of the Hallatts for a directed verdict as to liability. The jury assessed their damages at a total of $8,797.00, for which amount, together with costs of court, judgment was rendered against Richardson. For the collection of that judgment the Hallatts caused a writ of garnishment to be issued against Maryland.

In response to the garnishment, Maryland denied being indebted to Richardson on the ground that Richardson's conduct in failing and refusing to attend the trial of the negligence action brought against him amounted to a breach of Condition No. 17 of the policy, quoted supra. The jury in the garnishment proceeding returned a verdict against Maryland for $9,267.52. From the judgment entered upon that verdict this appeal is prosecuted. Maryland insists that the district court erred; (I) in denying its motion for a directed verdict; (II) in admitting certain evi-

dence; (III) in refusing to give certain instructions to the jury.

The pretrial stipulation provided that:

> "The sole issue to be tried is whether or not the assured, James Richard Richardson, has voided the insurance coverage under Policy No. 2-2236179, for violation of the assistance and cooperation clause of the said policy of insurance, as set forth in paragraph 2 of the reply of the garnishee to the plaintiffs' traverse.
>
> * * * * * *
>
> "The following issues of fact, and no others, remain to be litigated upon the trial:
>
> "(A) Maryland Casualty Company contends that the policy of automobile liability insurance was voided by its insured, James Richard Richardson, by violation of the assistance and cooperation clause of the said policy of insurance.
>
> "(B) The plaintiffs contend that the good faith and diligence of the garnishee with respect to the insured and the plaintiffs is an issue of fact to be resolved."

It is not claimed that Richardson failed to cooperate with Maryland from the date of the accident on April 11, 1956, to the time when the negligence case was finally set for trial on May 18, 1959. The claim is that Richardson's refusal to attend the trial was such a breach of the con-

dition as to relieve Maryland of its obligation to pay for the loss.

Maryland put one of its claim agents, Leonard W. Lafferty, Jr., on the stand and by him established that letters had been sent to the insured advising him of the date of the trial, requesting his attendance and offering to advance such sums as might be required to cover expenses of attending the trial. On cross-examination he was asked by counsel for the Hallatts as to whether or not Richardson's testimony would have been helpful. Over objection by Maryland he was required to answer. Maryland's claim manager, Thomas B. Barton, was put on the stand by it to show his efforts in attempting to produce Richardson's presence at the trial. On cross-examination, over objection, he was required to say whether, in his opinion, Richardson's testimony would have been helpful. The answers given to these questions were equivocal. Lafferty said he didn't know and Barton said it would be hard to say.

The objections were made to the testimony on the ground that it was improper to admit evidence for a purpose of showing that the insurance company was not prejudiced in the absence of the insured from the trial. It has been said that:

> "While a few courts have taken the view that liability policy clauses requiring the insured to cooperate in the defense of actions under the policy by attending the trial and testifying, where requested to do so, are to be construed strictly and in accordance with their plain terms, so that an insurer may escape liability by merely showing a failure or refusal to attend or testify, it

> appears to be the view of the great majority of the courts that the lack of cooperation by the insured in failing to attend the trial or testify must be substantial or material, and that a technical or inconsequential lack of cooperation is insufficient to void the policy. Before the insured's failure to attend the trial can be regarded as a material breach of the condition requiring the insured's cooperation, the insurer must show that the lack of cooperation resulted in prejudice to the insurer." 29 A Am. Jur. 588, Insurance § 1479.

In discussing the same question the Court of Appeals for the Seventh Circuit recently stated that a majority of American decisions hold that the failure of an insured person to attend a trial and aid in the defense when a case against him is called for trial, is prejudicial per se. *Potomac Insurance Co. v. Stanley*, 7th Cir. 1960, 281 F. 2d 775. We have no academic interest as to which pan of the scales carries the greater bulk of the precedents. Our task is to determine which of the conflicting rules is the law of Florida.

The earliest of the Florida cases to which our attention is called is *United States Fidelity & Guaranty Co. v. Snite*, 106 Fla. 702, 143 So. 615. There it appeared that the insured did everything he was requested to do by the insurer. The insured was not present at the trial. He was not asked to be present and the attorneys for the insurers made no effort to notify him at addresses furnished them where he might have been located. The insurer filed a motion for continuance stating that the insured was absent because he had not been informed that the case had been set for trial. The judgment was sustained because it

clearly appeared that the insured had not intentionally absented himself from the trial. In the course of the opinion it was observed that it had not been shown that if the insured had been present at the trial he could have rendered any assistance to the insurer. In view of the court's holding that the cooperation clause was not breached because the insured's absence from the trial was not intentional, we do not regard as a ground for decision the comment regarding the failure to show that the insured could have rendered assistance if he had been present. The opinion, as we read it, does not announce a principle that a showing must be made that the presence of the insured would probably have changed the result of the trial. In the Snite case the cooperation clause required the insured to "aid in securing information, evidence and the attendance of witnesses, in effecting settlements and in defending suits . . . " and "at all times render to the Company all reasonable cooperation and assistance." The policy did not contain a provision such as is in the policy here which expressly requires the insured to attend hearings and trials. Even if it could be said that prejudice must be shown for an insurer to be relieved of liability for a breach by the insured of a covenant to render cooperation and assistance, it does not follow that the rule would be applicable where the insured breached an undertaking to attend hearings and trials.

In the case of *American Fire and Casualty Company v. Vliet*, 148 Fla. 562, 4 So. 2d 862, 139 A.L.R. 767, the automobile liability policy insured J. R. Battle and his wife. The insured car while being driven by Mrs. Battle was involved in an accident resulting in injuries to Clarence L. Vliet who recovered judgment against the Battles and garnished the insurance company. The Battles had moved

from Florida to Georgia, J. R. Battle had become insane. Mrs. Battle declared her willingness to go to Florida and render any assistance she could if the insurer would guarantee her expenses. This was not done. The court held that an insured is not required to attend a trial at his own expense, and a failure to do so does not void the policy. The court, in its opinion, stated that the breach of the cooperation clause must be material and the insurer must show substantial prejudice. In this case, as in the Snite case which it cites, the decision was based upon the fact that the absence of the insured was justified. The court's observation as to the need for showing prejudice is, we think, obiter dictum and not a statement of the law of Florida which is binding upon us. The court cited with approval the case of *Bauman v. Western & Southern Indemnity Co.*, 230 Mo. 835, 77 S.W. 2d 496, where it is shown that it is only an unexcused failure to cooperate which releases the insurer from liability.

The most recent of the Florida cases involving the cooperation clause in automobile liability insurance policies in *American Universal Insurance Co.* v. *Stotsberry*, Fla. App. 116 So. 2d 482. The appellate court reversed a summary judgment for the insurance company. There was a question as to whether the insured knew that a suit had been brought against him so as to permit a finding of failure to cooperate because he had not been given notice of suit. There was a question as to whether the insurer had denied liability on another ground and, if so, whether such denial would excuse the insured's failure to cooperate. It was contended by the insurer that the insured had absented himself and so became unavailable for appearance at the trial. Citing the Snite and Vliet cases, the court held that there were fact issues as to whether the circumstances

of the insured's absence or failure to cooperate were such as to amount to a breach of the cooperation clause. The clause was reversed for a trial of the fact issues.

It is our belief that the Florida appellate courts have not had before them for decision the question as to whether the unexcused absence of an insured from a trial, contrary to the express provision of a cooperation clause in an automobile liability policy of insurance, will relieve the insurer from liability without proof that the insurer was prejudiced by the insured's absence. Whatever may have been said in any of the opinions of the Florida courts was not essential to the decision. It was, therefore, mere obiter dictum. See *Pell v. State*, 97 Fla. 650, 122 So. 110. A federal court in a diversity case, adjudicating a matter arising under state law, has been characterized as "in effect, only another court of the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1469, 89 L. Ed. 2079, 160 A.L.R. 1231. This being so, a federal court is not bound by a decision which would not be binding upon the courts of the state. *King v. Order of United Commercial Travelers*, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U.S. 878, 68 S. Ct. 900, 92 L. Ed. 1153. The Florida courts have held, on a number of occasions, that the language in a judicial opinion which is not essential to the decision is without force as a precedent. *State v. Florida State Improvement Commission*, Fla., 60 So. 2d 747; *Twyman v. Roell*, 123 Fla. 215, 166 So. 215; *State ex rel Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4; *Pell v. State*, supra. We conclude that the question as for the need for proving prejudice is not controlled by any of the decisions of the Florida courts.

Since we find no authoritative precedent of a Florida

court it is appropriate that we be guided by the period decisions of this Court as, in effect, another court of the State. Cf. *MacGregor vs. State Mutual Life Assurance Co.*, 315 U.S. 280, 62 S. Ct. 607, 86 L. Ed. 846, reh. den. 315 U. S. 829, 62 S. Ct. 903, 86 L. Ed. 1224. Pertinent to and, we think, decisive of the question under consideration are the two Rexford cases, *Royal Indemnity Co. v. Rexford*, 5th Cir. 1952, 197 F. 2d 83, and *Rexford v. Royal Indemnity Co.*, 5th Cir., 1954, 215 F. 2d 693. These cases were appealed from the District Court for the Southern District of Florida and were decided under the law of Florida. There, as here, the court admitted evidence on behalf of the plaintiff in garnishment for the purpose of showing that the failure to cooperate was not material since under the evidence there was no defense to the suit. Permitting the introduction of this evidence was characterized as retrying the damage suit and improper. In reversing the cause for a new trial, the Court, in the first Rexford case, held that the failure of an insured to attend trial would be material noncooperation. The Court quoted with approval from *Cameron v. Berger*, 132 Pa. Super. 484, 1 A. 2d 529, 533, where it was said, "The very fact that the defendant was absent without explanation and could not be secured was prejudicial to garnishee's rights and would have a material effect on the verdicts." The Court approved the following statement from *Glens Falls Indemnity Co. v. Keliher*, 88 N. H. 253, 187 A. 473, 476, "Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial." This Court commented that the cited cases from Florida were to no different effect that those from which it quoted.

The case of *Cameron v. Berger*, supra, from which this

Court quoted in the Rexford opinion, was affirmed by the Supreme Court of Pennsylvania. *Cameron v. Berger*, 336 Pa. 229, 7 A. 2d 293. The Court of Appeals for the Seventh Circuit in *Potomac Insurance Company v. Stanley*, supra, where Indiana law controlled in a diversity case, quoted at length from the first Rexford case and followed the holding of this Court that failure of an insured to attend a trial would be prejudicial noncooperation. In the opinion of the Seventh Circuit it said:

> "We think the majority view, that the failure of an insured person to attend a trial and aid in the defense when a case against him is called for trial, is per se, prejudicial, is consistent with the established principle of Indiana law that one who would seek to enforce a contract for his benefit must show that he has performed all conditions on his part required to be performed as a condition precedent to his right." 281 F. 2d 775, 781.

The Florida law, like that of Indiana, requires that performance of conditions precedent, or a valid excuse for nonperformance, must be made to appear. *Ballas v. Lake Weir Light & Water Co.*, 100 Fla. 913, 130 So. 421. The rule announced in the Rexford opinion seems to be the law of Arkansas where the District Court for the Western District of Arkansas cited and followed the Rexford decision. *Roberts v. Commercial Standard Insurance Co.*, 138 F. Supp. 363.

While insurance contracts are to be liberally construed in favor of the insured, yet such contracts are subject to the same rules of construction applied to other contracts, and language used in a policy of insurance is to be given its

popular and usual significance unless the context requires a different construction. *Aetna Casualty & Surety Company v. Cartmel*, 87 Fla. 495, 100 So. 802, 35 A. L. R. 1013; 18 Fla. Jur. 4, Insurance §§ 91, 92. The Supreme Court of Florida has considered the effect of conditions relieving an insurance company of liability and in so doing took occasion to say:

> "In Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, text 392, 45 So. 761, text 787, we said: 'All parties litigant who are sui juris, whether railroad corporations or their employees, in the eyes of the law, before the courts, stand upon an equal footing, entitled to equal rights and protection and none to special privileges.' We would now add insurance companies and the insured, and that the persons insured, like railroad employees, cannot be said 'to be wards of the court.' We also held in the cited case as in Scotch Mfg. Co. v. Carr, 53 Fla. 480, 43 South. 427, that parties are free to make what contracts they please, so long as no fraud or deception is practiced and there is no infraction of law. We further held that the fact that one of the parties made a rather hard bargain would not avoid the contract. This being true, and the plaintiff having accepted a policy from the defendant with such a clause or condition of the contract therein, why should not the defendant have the legal right, in an action brought against it on such policy, to base its defense on such provision?" Southern Home Insurance Co. v. Putnal, 57 Fla. 199, 49 So. 922, 930.

Why, too, should not Maryland Casualty Company have

the right to be relieved from liability because of the failure of the insured to attend the trial without having to show that it was prejudiced?

The word "prejudice" is one of different meanings. As used here it means that the insurer is hurt or injured in that it is less able to resist a claim against its insured by defeating recovery or reducing the award of damages. *Long v. Brown*, 64 Idaho 39, 128 P. 2d 754; *Itzkowitz v. Finer & Bachsach*, 218 App. Div. 440, 218 N.Y.S. 272. Whether or not the testimony of the insured would be beneficial to the defense, his presence at the trial would justify the jury's belief in his faith in the defense, as noted in Rexford, supra, and, as pointed out by the Sixth Circuit:

> "His failure to be present in defense of the claim can have an intangible effect upon the jury both as to the question of liability and the amount of the verdict, the net effect of which is difficult to measure. Unexpected developments in the plaintiff's evidence might be offset by an explanation on the part of the insured. Inaccurate or exaggerated testimony at the time of the trial may be prevented or held to a minimum by the mere presence of the insured." Beam v. State Farm Mutual Automobile Insurance Co., 6th Cir. 1959, 269 F. 2d 151.

The court cited, in support of the quoted statement, *Bauman v. Western & Southern Indemnity Co.*, supra, which was approved in the Vliet case. The Bauman case was also cited and relied upon in *Fischer v. Western & Southern Indemnity Co.*, Mo. App., 106 S. W. 2d 490, from which this Court quoted in the Rexford case.

Our conviction that the courts of Florida would not require a showing of prejudice to an insurer in order that it might be relieved of liability by breach of the insured's duty to attend the trial is strengthened by the decision of the Florida District Court of Appeal in *State Farm Mutual Automobile Insurance Co. v. Ranson*, Fla. App. 121 So. 2d 175, decided in 1960. The condition which was breached by the insured was the clause requiring the giving of notice of accident as soon as practicable. The court took notice of the conflict of the authorities on the question as appeared in the annotation at 18 A. L. R. 2d 443, 479. It was held that since the policy contained a provision that no action should lie against the insurance company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of the policy, the question of notice became immaterial once it became established that the notice was not given as soon as practicable. The policy before us contains a clause identical with the clause in the Ranson case to the effect that compliance with policy requirements is a condition precedent to recovery. We see no logical reason for a different rule where the breach is one of the clause providing for notice than in a case where there is an unjustified absence from the trial. We conclude that under the law of Florida, prejudice need not be shown.

Since the question of prejudice was not a proper issue the court's admitting, over objection, of evidence on the question was error, and for that error the judgment must be reversed. The insurance company attempted, by evidence, to show that it had been prejudiced but by doing so it did not waive its objections to the evidence offered by the garnishor which was improperly admitted. 1 Wigmore on Evidence, 3rd Ed. 345, § 18. Cf. *Louette v. State*, 152

Fla. 495, 12 So. 168. The insurance company did not preserve objections to the court's instructions as to the necessity for proof of prejudice. See *Clark-Warwick, Inc. v. National Fire Insurance Co.*, 5th Cir. 1961, 291 F. 2d 828, and cases there cited. However, since the case was tried on an erroneous theory of law and evidence under that theory was received over objections, we do not need to reach the specification of error relating to instructions.

One of the issues in the district court was whether Maryland had exercised good faith and diligence in making efforts to procure the attendance of Richardson at the trial, and the Hallatts contended that the evidence supported their contention that good faith and diligence were not shown. There was some evidence from which it might have been inferred that Maryland was hoping it could use the noncooperation of Richardson as a basis for disclaiming liability. The insurer must exercise good faith and diligence, but if it does so and is unsuccessful in its efforts, it will not be precluded for disclaiming liability because of its desire to be released. 6 Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed. 74 § 4059. So too, must the insured use good faith. If he is to be absent from the trial and the absence is to be successfully asserted as a breach of the policy, it must be shown that the absence was intentional and without legal excuse or justification. *United States Fidelity & Guaranty Co. v. Snite*, supra. There may be an issue as to whether, as said in the first Rexford case, the absence was accidental or incidental. 197 F. 2d 83, 86.

In the usual case the question as to whether there has been an unjustified refusal to attend a trial so as to relieve the insurer of liability is one of fact for the jury. *United*

States Fidelity & Guaranty Co. v. Snite, supra; *American Fire & Casualty Co. v. Vliet*, supra; *American Universal Insurance Co. v. Stotsberry*, supra. If, however, the evidence is without dispute and clearly shows a failure to cooperate, a directed verdict should be granted for the insurer. *State Farm Mutual Automobile Insurance Co. v. Ranson*, supra; *Williams v. Employers Mut. Liability Ins. Co. of Wisconsin*, 5th Cir. 1942, 131 F. 2d 601. See also *Associated Indemnity Corporation v. Davis*, 3rd Cir., 1943, 136 F. 2d 71. Although the failure of the insured to attend a trial is, as a matter of law in Florida, prejudicial to the insurer, we think that, on the issues of the good faith and diligence of Maryland and the excuse or justification of Richardson for nonattendance, questions for the jury were present.

On the question of the failure of an insured to comply with a cooperation clause, the burden of proof is cast upon the insurer to establish the facts showing the breach by the insured. *United States Fidelity & Guaranty Co. v. Snite*, supra; *Williams v. Employers Mutual Liability Insurance Co.*, supra. But the insurer is required to do no more than to show that it exercised good faith and diligence in an effort to procure the attendance of the insured at the trial and that the insured did not attend. It is not required to anticipate and negate all of the excuses and reasons that might justify the nonattendance of the insured. If, counsel has suggested, Richardson might have jeopardized his job by leaving it to attend the trial, but that he might have attended at a later date, this might have justified his breach of the policy provision. Cf. *State Farm Mutual Automobile Insurance Co. v. Palmer*, 9th Cir., 1956, 237 F. 2d 887. If this was so, or if other excuse or justification existed for Richardson's absence from the trial, the

burden of establishing it rested upon the Hallatts. 1 Jones on Evidence, 5th Ed. 375 et seq., § 207; *Grand Assembly, etc. v. New Amsterdam Casualty Co.*, Fla. App. 102 So. 2d 842.

Since the case was tried on an erroneous theory of law as to the necessity of proof by Maryland that it was prejudiced by the absence of Richardson from the trial the judgment must be reversed. Since there are fact issues that the trier of fact should determine, the cause will be remanded for a new trial.

REVERSED AND REMANDED.

RIVES, Circuit Judge, dissenting:

Richardson's liability to respond in damages for the injuries which he had inflicted on Mr. and Mrs. Hallatt was fully covered by insurance on the date of the collision, April 11, 1956, and remained so protected for more than three years. Richardson declined to come from Massachusetts to Florida to attend the trial, stating that he had been out of work all of the preceding winter, and had then secured a job painting bridges which paid him $200.00 per week. There was no proof that Richardson could give any testimony beneficial to the defense of the negligence action. There had been no effort to take his deposition. The evidence of Richardson's liability was such that the trial court directed a verdict for the Hallatts on that issue. The Hallats got a judgment against Richardson for $8,797.00. Maryland Casualty Company refuses to pay that amount to the Hallatts because it says that Richardson breached

the condition of the policy providing for "Assistance and Cooperation of the Insured": "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." The district court admitted evidence, over Maryland's objection, from which the jury might, and probably did, determine that Richardson's mere presence at the trial was not material, and that his failure to attend was not prejudicial to the defense of the action. The majority holds that the failure of the insured to attend the trial in Florida is prejudicial to the insurer as a matter of law, and hence that the question of prejudice was not a proper issue for the jury. I agree with the district court.

Automobile liability insurance supplies a highly important social need. Without it few of the drivers on our highways could respond in damages to the victims of their negligence. Some of the States have recognized the social need by enacting compulsory automobile liability insurance laws. Many more encourage the taking of liability insurance by financial responsibility laws, or by other means. That social need should be kept in mind by the courts, especially in a case like this, where the liability insurer admits coverage on the date of the injury but claims a defense arising more than three years thereafter because of conduct of its insured, in which the injured persons had no part. In such cases, the courts will, of course, accord to the liability insurer all legally sufficient defenses, but they should, I submit, be slow to recognize technical defenses or those which are not really substantial.

In differing with the learned district judge, my

brothers find that there is no case in point from the Florida appellate courts: "Whatever may have been said in any of the opinions of the Florida courts was not essential to the decision. It was, therefore, mere obiter dictum." I disagree.

In the first place, I do not agree with my brothers that every statement in an opinion not essential to the decision is mere obiter dictum. For example, in *Parsons v. Federal Realty Corporation*, Fla., 1932, 143 So. 912, 920, the Florida Supreme Court said: "Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined."

The rule of the Supreme Court of the United States is to like effect:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

Union Pacific Co. v. Mason City Co., 1905, 199 U. S. 160, 166.

In *State Roads Commission v. Johnson*, 222 Md. 493, 161 A. 2d 444, it was held that where the court's statement was germane and may have been intended to guide the trial court upon retrial of the case, the statement was not dictum.

Let me re-examine the cases from the Florida appellate courts to show why I disagree with my brothers' holding that the pertinent statements in those cases are mere obiter dicta.

In *U.S.F. & G. Co. v. Suite*, 1932, 143 So. 615, 616, the liability insurer defended on the ground that its insured had violated the condition of the policy requiring his cooperation in defending the suit. The insured had been absent from the trial of the damage suit. In the course of its opinion, the Supreme Court of Florida said: "Neither is it shown that, if Scocos had been present at the trial, he could have rendered any assistance to the surety company in connection therewith which would probably have changed the result of that trial." My brothers dismiss that statement as mere dictum, saying: "In view of the court's holding that the cooperation clause was not breached because the insured's absence from the trial was not intentional, we do not regard as a ground for decision the comment regarding the failure to show that the insured could have rendered assistance if he had been present." With deference, I submit that my brothers have misapprehended the holding of the Florida Court. While it made the statement which my brothers paraphrase, that Court did *not* itself hold that the cooperation clause had not been breached, but merely held that the jury was warranted in reaching that conclusion. To make that clear, at the risk of repetition, I quote somewhat fully:

"The record fails to show any bad faith on the part of Scocos in connection with his absence from the trial. Neither is it shown that, if Scocos had been present at the trial, he could have rendered any assistance to the surety company in connection therewith which would probably have changed the result of that trial. The record affirmatively shows by the allegations of the motion for continuance above referred to, and by which allegations the surety company was bound, that Scocos had not intentionally absented himself from that trial.

"The question of whether or not Nicholas Scocos violated the condition of the liability policy above referred to in such manner as to relieve the surety company of liability on its policy became a question of fact for the jury to determine, the burden of proof being on the surety company to show that such condition of the policy had been so violated. See Taxicab Motor Co. v. Pacific Coast Casualty Co., etc., 73 Wash. 631, 132 P. 393; U. S. Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 A. 660; U. S. Casualty Co. v. Drew (C.C.A.) 5 F. (2d) 498.

"The jury resolved this question against the surety company. The evidence warranted that conclusion." (143 So. at p. 616.)

The failure to prove that the insured's absence from the trial prejudiced the defense of the case was *one* of the reasons which led the Florida Supreme Court to hold that the jury was warranted in resolving the question against

the insurance company. True, it was one of several such reasons. It seems clear to me that the pertinent statement in the *Snite* case is not dictum, but is a part of the ratio decidendi. See *Parsons v. Federal Realty Corporation, supra*; *Union Pacific Co. v. Mason City Co., supra.*

My brothers next undertake to differentiate the *Snite* case because the cooperation clause in the present case is more specific in requiring the insured to attend hearings and trials, saying: "The policy did not contain a provision such as is in the policy here which expressly requires the insured to attend hearings and trials. Even if it could be said that prejudice must be shown for an insurer to be relieved of liability for a breach by the insured of a covenant to render cooperation and assistance, it does not follow that the rule would be applicable where the insured breached an undertaking to attend hearings and trials."

With deference, I submit that the attempted distinction is not warranted. Under the present policy, the insured's duty to attend hearings and trials is simply a part of his broader duty to cooperate. (See the condition for "Assistance and Cooperation of the Insured," heretofore quoted.) Assuming that there could otherwise have been some doubt about the proposition, the policy made definite that the required assistance and cooperation include the insured's attending the trial upon the insurer's request. There is, however, no indication that the effect of non-attendance is any different from the effect of any other failure to assist and cooperate. The Florida Supreme Court held in the *Snite* case, *supra*, that the jury, in determining the question of whether the insured had violated the condition of a liability policy requiring him to "aid . . . in de-

fending suits" and to "render to the Company all reasonable cooperation and assistance," could consider the lack of proof that the insurer was prejudiced by his absence from the trial. The rule should not be different because the policy spells out the already obvious fact that cooperation includes the insured's compliance with the insurer's request to attend the trial. Under either provision, the failure to cooperate is not material unless it is prejudicial to the insurer.

In the case of *American Fire & Casualty Co. v. Vliet*, Fla., 1941, 4 So. 2d 862, 863, the Court did hold as a matter of law that the insured did not violate the cooperation clause when she failed to come to court from a distant city at her own expense, and I would concede that its statement about the necessity of proving prejudice was dictum. It was nonetheless a clear and well-considered statement of the law of Florida, viz: "The rule is that to constitute the breach of such a policy the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by the failure to cooperate."

That statement was quoted approvingly by the Third District Court of Appeals of Florida in *American Universal Insurance Co. v. Stotsberry*, 1959, 116 So. 2d 482, 484. That Court reversed a summary judgment against the liability insurer, and remanded the cause for further proceedings. The quotation was obviously intended to guide the trial court in determining "whether the circumstances of Lorenzo's absence or non-cooperation were such as to amount to a breach of the co-operation clause of the policy under the facts of this case." As such, the statement should not be reduced to the level of a "mere dictum" on the part

of the appellate court. See *State Roads Commission v. Johnson, supra.* Nor can any attempted distinction be drawn as to the wording of the cooperation clause, for it was the same in that case as in this. See 16 So. 2d 483, n. 2.

Let me go further, and assume *arguendo* that my brothers are correct in holding that all three statements of the Florida appellate courts are dicta, what then? Are the statements to be wholly disregarded, as the majority opinion would seem to indicate? The Florida cases cited in that opinion go no further than to hold that dictum "is not controlling" in a subsequent case. *State v. Florida State Improvement Commission*, 1952; 60 So. 2d 747, 750. The rule in Florida appears no different than that in other common-law jurisdictions, that dictum by the highest court of the jurisdiction or by an appellate court, while not controlling, is entitled to respectful consideration. 21 C. J. S., Courts, Sec. 190, pp. 313, 314. My brothers themselves made a clear statement of the true rule in an extremely recent case: "If as dicta the statements are to be treated, they must nevertheless be regarded as considered and repeated dicta, and therefore highly persuasive of the correctness of the Commission's decision." *Miss. Valley Gas Co. v. Fed. Power Commission*, 5 Cir., No. 18501, m/s, decided September 12, 1961 (per Jones, Circuit Judge; Tuttle, Chief Judge, and Cameron, Circuit Judge, concurring). An immediate example is supplied by the Florida appellate court in the *Stotsberry* case following the dictum of the Supreme Court of that State in the *Vliet* case. This Court, as "in effect, only another Court of the State," should, I think, do likewise.

As was said in *West v. A. T. & T. Co.*, 1940, 311 U. S. 223, 236, 237:

"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. See *Erie Railroad Co. v. Tompkins, supra*, 78 [304 U. S. 64, 78]; *Russell v. Todd, supra*, 203 (sic) [309 U. S. 280, 293]."

Professor Moore collects the pertinent authorities in 1 Moore's Federal Practice, 2nd ed., p. 3312, in support of his text that:

"The obligation to accept local law extends not merely to definitive decisions, but to considered dicta as well, and if explicit pronouncements are wanting, the federal court should endeavor to discover the law of the state on the point at issue by considering related decisions, analogies, and any reliable data tending convincingly to show what the state rule is."

Surely expressions to like effect in the opinions of two State Supreme Court Justices concurred in by their colleagues, and still further in an opinion of a State Appellate Court Judge concurred in by his colleagues, must rank *at least* as "considered dicta" to be used along with any other relevant data to ascertain state law.

By what seems to me to be a kind of bootstrap operation, my brothers consider themselves bound by two cases from this same federal Court of Appeals: "Pertinent to and, we think, decisive of the question under consideration are the two Rexford cases, *Royal Indemnity Co. v. Rexford*, 5th Cir. 1952, 197 F. 2d 83, and *Rexford v. Royal Indemnity Co.*, 5th Cir. 1954, 215 F. 2d 693."

The careful annotator in 60 A. L. R. 2d 1151 observed that this Court in *Royal Indemnity Co. v. Rexford*, 1952, 197 F. 2d 83, "approved, arguendo, the statement that the very fact that an insured is absent from the trial without explanation is prejudicial to the rights of the insurer and has a material effect upon the verdict." I agree with the annotator that that part of the opinion was dictum. The decision was expressly stated to be "because of the error in permitting the plaintiff to retry the damage suit, the case was not fairly tried on the issue of non cooperation." This Court stated unequivocally that "there is no doubt that, under all the authorities, the non-cooperation must have been material." (197 F. 2d at 86). Further, the Court expressly denied any intention to direct the rendition of a verdict.

> "The case is a very close one as to whether there should not have been an instructed verdict in favor of the insurer on the ground that the in-

> sured failed as matter of law to cooperate, but we have concluded that the judgment should not be reversed and rendered on that issue."

(197 F. 2d at 86). Upon remand, nevertheless, the district court did just that, and upon second appeal this Court again reversed, stating that "the decision in the former appeal, reported in 197 F. 2d 83, became the law of the case and, as this court found at that time that it was not proper for a directed verdict to be granted . . . " *Rexford v. Royal Indemnity Company*, 5 Cir., 1954, 215 F. 2d 693, 694.

The *Rexford* cases appear to me to support the rulings of the district court in the present case, if effect be given to their actual holdings rather than to dictum. Certainly, to my way of thinking, the cases of *U.S.F. & G. Co. v. Snite*, *supra*, and *American Universal Insurance Co. v. Stotsberry*, *supra* are *decisions* binding upon this Court under the Erie doctrine. Under all of the Florida cases which have either passed upon or discussed an insured's breach of the cooperation clause of condition, I submit, the injured person may show lack of prejudice to the insurer and that the failure of the insured was immaterial and unsubstantial and, hence, not a breach of the cooperation clause within the fair intendment and purpose of that clause. I think that the judgment should be affirmed, and therefore respectfully dissent.

28 U.S.C. § 48 Terms of court

Terms or sessions of courts of appeals shall be held annually at the places listed below, and at such other places within the respective circuits as may be designated by rule of court. Each court of appeals may hold special terms at any place within its circuit.

Circuits	*Places*
District of Columbia	Washington.
First	Boston.
Second	New York.
Third	Philadelphia.
Fourth	Richmond, Asheville.
Fifth	New Orleans, Atlanta, Fort Worth, Jacksonville, Montgomery.
Sixth	Cincinnati.
Seventh	Chicago.
Eighth	St. Louis, Kansas City, Omaha, St. Paul.
Ninth	San Francisco, Los Angeles, Portland, Seattle.
Tenth	Denver, Wichita, Oklahoma City.

Any court of appeals may, with the consent of the Judicial Conference of the United States, pretermit any regular term or session of the court at any place for insufficient business or other good cause. As amended Oct. 31, 1951, c. 655, § 36, 65 Stat. 723.

RULES OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Rule 3 Terms

A session of this court shall be held annually at the city of Atlanta, Ga.; at the city of Montgomery, Ala.; at the city of Fort Worth, Tex.; at the city of Jacksonville, Fla.; and at the city of New Orleans, La., and shall be adjourned to such other times and places as the court may from time to time order and designate.

FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 952.

MARYLAND CASUALTY COMPANY,
Petitioner,

vs

HARRY H. HALLATT, Individually and as Executor of the Estate of MARY VALENTINE HALLATT, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Introduction.

The petition for writ of certiorari brings here for review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered January 10, 1964, reported at 326 F. 2d 275, in which the Court vacated and set aside its former opinion and judgment (295 F. 2d 64) entered on October 6, 1961 and reinstated the judgment of the lower court entered June 17, 1960.

Identity of Parties and Record References.

For convenience, we will refer to the garnishee in the court below (Maryland Casualty Company) as "the petitioner" and to the plaintiffs in the court below as "the respondent". All reference to the transcript of record will be preceded by the designation "R" and references to the appendix to petitioner's brief will be preceded by the designation "A".

THE FACTS.

HARRY H. HALLATT and MARY VALENTINE HALLATT, his wife (now deceased) brought a writ of garnishment against MARYLAND CASUALTY COMPANY to satisfy a personal injury judgment in the sum of $9,267.52. The garnishment action was tried in the United States District Court for the Southern District of Florida, which had jurisdiction by reason of diversity of citizenship. The action sought to reach the proceeds of an automobile liability policy issued by Maryland to the judgment debtor, James R. Richardson. Maryland contended that Richardson's (the insured) noncooperation in failing to attend the trial of the personal injury suit voided the coverage. The garnishment case was tried on the theory that the case law of Florida provided that Maryland was required to show proof of prejudice by the insured's noncooperation in order that it might be relieved of liability. The Court of Appeals for the Fifth Circuit, on October 6, 1961, by a 2 to 1 majority opinion, held that the case was tried on an erroneous theory of law as to the necessity of proof by Maryland that it was prejudiced by the absence of the insured for the trial, and reversed the judgment (A 26), holding that the noncooperation was prejudicial as a matter of law. In order to so hold, it was necessary for the Court of Appeals to declare three pronouncements of the Courts

of Florida theretofore written as "mere obiter dictum" (A 18) insofar as they purportedly upheld the theory that material prejudice must be shown. This Court denied certiorari March 19, 1962 (82 S. Ct. 830, 369 U.S. 819, 7 L. Ed. 2d 785).

The cause was remanded to the U.S. District Court for the Sonthern District for a new trial solely on the issues of the good faith and diligence of Maryland in making efforts to procure the attendance of Richardson at the trial and whether or not Richardson's absence from the trial was excusable or justifiable (A 24, 25). The issue of prejudice was removed from consideration of the trial court on retrial by the pronouncement of the Appeals Court. On retrial under the issues made by the Appeals Court, judgment was rendered for Maryland on August 29, 1962, from which the respondent appealed on October 16, 1962 (R 6, 146).

After rendition of the judgment and during the pendency of the appeal, the District Court of Appeals for the Third District of Florida rendered its decision in *Barnes* v. *Threshermen and Farmers Mutual Casualty Insurance Company*, on November 5, 1962, reported in *146 So. 2d 119* (Cert. Den. *153 So. 2d 305* on March 28, 1963) (P 164 A 2). Then the Florida Court categorically and by name rejected the opinion of the United States Court of Appeals for the Fifth Circuit in the first *Hallatt case (295 F. 2d 64)* and *specifically adopted the dissenting opinion as correctly enunciating the law of Florida as it was at the time of the jury verdict in the lower court entered on June 17, 1960* (A 2, 3).

On January 7, 1963 the respondent filed his Motion for Reconsideration of the initial decision of the Court of Appeals in case No. 18485, to which the petitioner filed a reply on January 17, 1963.

On February 8, 1963 the Court of Appeals, by Order, denied the Motion for Reconsideration as filed in case No. 18485 but stated that the question raised by the Motion could be presented and considered in the present appeal No. 20197 pending before that Court.

On February 19, 1963 the respondent filed his Motion for Abatement of Appeal and/or Reconsideration in the Court of Appeals case No. 20197 (A 2).

On March 13, 1963 the said Court of Appeals granted the Motion of the respondent for a postponement of the hearing of the appeal in case No. 20197 until after a final decision in the case of *Barnes* v. *Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Company, 146 So. 2d 119* by the Supreme Court of Florida.

On April 3, 1963 the respondent filed his Supplement to the Motion for Abatement of Appeal and/or Reconsideration, bringing to the Court's attention the decision of the Supreme Court of Florida denying certiorari in the Barnes case, supra, entered March 28, 1963, to which Motion the petitioner replied, and on May 21, 1963 the Court of Appeals denied abatement and postponed the respondent's Motion for Reconsideration of that Court's opinion in the prior appeal in that Court, case No. 18485, pending a hearing by the Court of case No. 20197. Thereafter, appellate briefs for both sides were duly filed.

The Court of Appeals, in view of that court's decision in *Connor* v. *New York Times Co., 1962, 310 F.2d 133*, on November 19, 1963 requested further briefs from the parties to appeal No. 20197 as to whether the previous decision (Case No. 18485) was binding as the law of the case in the light of the Barnes decision, supra, and called respective counsel's attention to that court's Order postponing the Motion for Reconsideration of that court's opinion in the prior appeal, No. 18485, pending a hearing of No. 20197.

Thereafter, supplemental briefs were filed by all parties, and on December 6, 1963, the pending Motion and the appeal came on to be heard (A 2, 3, 4, 5).

The Court of Appeals On January 10, 1964, after considering the Motion for Reconsideration granted same, thus making further consideration of the appeal in No. 20197 moot. (A 2-5)

REASONS FOR THE DENIAL OF THE WRIT.

In response to petitioner's reason for allowance of the writ, the following is submitted.

As a general rule the decision of an Appellate Court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice. United States v. Ohio Power Co., 353 U.S. 98; Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Co., (1919, C.A. 2 N.Y.) 261 F. 878, 8 A.L.R. 1023; Luminous Unit Co. v. Freeman-Sweet Co., (1924, C.A. 7 Ill.), 3 F. 2d 577; Sedalia ex rel. Ferguson v. Shell Petroleum Corp., (1936, C.A. 8, Mo.) 81 F. 2d 193, 106 A.L.R. 1327 (stating that the doctrine of the law of the case as applied to successive appeals, is not an absolute rule of law, but rather a rule of practice or procedure); Cochran v. M. & M. Transp. Co., (1940, C.A. 1 R.I.) 116 F. 2d 519; Kaku Nagano v. Brownell, (1954, C.A. 7, Ill.) 212 F. 2d 262 (recognizing that the doctrine of the law of the case is not an "ironclad rule"). (A 3)

The Appellate Court in its decision (A 3) recognized that its power to depart from its own ruling on a former appeal should be exercised sparingly and only in excep-

tional cases. However, that court determined that this was an exceptional case, the litigation had not yet terminated, and the initial error was its misapplication of governing state law.

As the appellate court said (A 4):

> "This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were 'dead wrong'. The Florida Court in Barnes has saved us from committing a miscarriage of justice. . . ."

The United States Court of Appeals for the Fifth Circuit itself has adhered to this doctrine in the case of *Commercial National Bank in Shreveport* v. *Connelly*, *176 Fed. 2d 1004*, wherein the court said at *page 1006*:

> "A doctrine of the law of the case usually raises a disinclination on the part of an appellate court to re-examine its own prior legal pronouncements in a case, but the doctrine does not destroy its power to do so." (Messenger v. Anderson, 225 U.S. 436, 32 S. Ct 739, 56 L. Ed. 1152; Texas Company v. Pensacola Maritime Corp., 5 Cir. 292 Fed. 61; and Hotel Markham, Inc., et al v. Ball, 5 Cir. 131 Fed. 2d 424).

It is noted that the Fifth Circuit Court in the aforesaid case cited with approval the case of *Messenger* v. *Anderson, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152*, on writ of certiorari from U.S. Court of Appeals, 6 Circuit. The Circuit Court of Appeals, in a Will case first held that James Anderson took only a life estate in certain property. Pending these proceedings another case was tried in the state court between the same parties covering different lands but depending on the same title, in which it was found by the lower court and affirmed on writ of error

to the Supreme Court of Ohio that James Anderson took a fee. The Supreme Court held:

> "The judgment of the lower court was pleaded but it was held by the Circuit Court of Appeals, after the affirmance by the Supreme Court, that its own previous decision was the law of the case, and that it was not at liberty to reverse the judgment even if the matter was res judicata. * * * In the absence of statute the phrase 'law of the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided not a limit to their power. * * * Of course this court, at least, is free when the case comes here. * * * In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals it was right."

The right of that court to reverse itself in such an instance was again affirmed by that court in the case of *Seagraves v. Wallace, 69 Fed. 2d 163 5 Cir.*, wherein the court said:

> "An appellate court, so long as it has jurisdiction over the controversy ought to have power to do justice according to law, and should be more ready to correct its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency. The court is not bound at the will of litigants to revise its previous holdings, but, when itself convinced that it should, it can. It may not say stare decisis but fiat justicia ruat coelum. Johnson v. Cadillac Motor Co., C.C.A. 261 F. 878, 879, ALR 1023, Higgins v. California Prune and Apricot Grower, 3 Fed. 2d 896; Luminous Unit Co. v. Freeman-Sweet Co., 3 Fed. 2d 577." (To same effect, Atchison T. & S. Fe Railway Co. v. Bollard, 5 Cir. 108 Fed. 2d 768) (parentheses supplied)

Finally, the State of Florida itself is committed to this doctrine as is evidenced by the statements of the Supreme Court of Florida in the case of *Beverly Beach Properties v. Nelson, 68 So. 2d 604, 41 ALR 2d 1071;* cert. den. *Rensta v. Beverly Beach Properties, Inc., 348 U.S. 816 99. L. Ed. 643, 75 S. Ct. 27,* wherein Justice Hobson, speaking for the Supreme Court of Florida, said, at *pages 607, 608:*

> "This is the same suit and we have not lost jurisdiction thereof. Consequently, we have the power to correct any error which the Chancellor or we may have heretofore made in the progress of this litigation. There is no question of res adjudicata because this is the same, not a new and different suit. However this Court, among others, has gone so far as to hold that it will not invoke the doctrine of res adjudicata if to do so would work injustice. The propriety of such ruling can not be questioned when one reflects upon the fact that the primary purpose for which our courts were created is to administer justice. In the case of Wallace v. Luxmoore, 156 Fla. 725, 24 So. 2d 302, 304, we said:
>
> " 'Stare decisis and res adjudicata are perfectly sound doctrines, approved by this court, but they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.'
>
> "A Court should have less hesitancy in changing 'the law of the case' before losing jurisdiction than it would have in refusing to apply the doctrine of res adjudicata when all the requisites thereof are present.

> We may change 'the law of the case' at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude."

The error assumed by the petitioner is that the Barnes case, supra, introduced a new theory of law, whereas in truth and in fact, it reaffirmed the law as it existed at the time of the initial jury decision on June 17, 1960.

CONCLUSION.

It is respectfully submitted that the Appellate Court had the right to entertain the Motion for Reconsideration and had the right to correct its own errors.

For the foregoing reasons Writ of Certiorari should be denied.

Dated: April ....., 1964.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on this ..... day of April, 1964 a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed to Dewey Knight, Esquire, Attorney for petitioner, Knight, Smith, Underwood & Peters, 807 Ingraham Building, Miami, Florida.

.....

LAWRENCE G. ROPES, JR.